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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MADHAVJI A. UNDE,

Plaintiff and Appellant,

v.

L'OREAL USA, INC.,

Defendant and Respondent.

C043002

(Super. Ct. No.
00AS05246)

Plaintiff Madhavji A. Unde (Unde) purchased an over-the-counter face cream manufactured by defendant L'Oreal USA, Inc. (L'Oreal). After several applications, Unde noticed preexisting spots on his face growing darker. Unde filed suit against L'Oreal, alleging strict liability, breach of warranty, and negligence in the manufacture of the face cream. A jury trial followed. At the close of Unde's case, the trial court granted L'Oreal's motion for a nonsuit, finding Unde failed to establish any link between L'Oreal's product and Unde's alleged injuries.

Proceeding in propria persona, Unde appeals, contending the court erred in granting L'Oreal's motion for nonsuit. Finding no error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Unde purchased L'Oreal's Plenitude Turning Point Instant Facial cream in September 1999. After several applications of the product, Unde alleged spots on his face grew darker. Unde filed suit, alleging products liability and negligence against L'Oreal. The complaint stated Unde used the product in the manner intended and alleged strict liability and breach of written warranty theories of liability as well as negligence.

L'Oreal filed a motion for summary judgment. The trial court denied the motion. L'Oreal contended Unde's continued use of the cream in disregard of a warning label precluded liability under either cause of action. However, the court found L'Oreal's evidence insufficient to establish, as a matter of law, that Unde continued to use the product despite the warning label.

The case proceeded to trial; Unde appeared in propria persona.¹ L'Oreal filed a motion in limine asking the court to exclude all evidence of expert witnesses since Unde failed to respond to L'Oreal's request for disclosure of expert witnesses. L'Oreal filed a second in limine motion, seeking to prevent Unde

¹ Only portions of the jury trial pertaining to the nonsuit motions and the testimony of two nonexpert witnesses appear in the record.

from testifying about his opinion of causation or alleged defectiveness of L'Oreal's product. According to L'Oreal, such testimony presented a "technical area well beyond the understanding of a lay person." The court granted both motions.

Following Unde's opening statement, L'Oreal made a motion for nonsuit. L'Oreal argued that, in order to prove a prima facie case of defective product, Unde needed to provide expert testimony that the face cream was actually defective. According to L'Oreal, Unde could not establish the product's defectiveness by simply establishing a causal relationship between its use and his skin's darkening. L'Oreal also argued Unde could not make a prima facie case as to negligence in the absence of expert testimony.

The court disagreed with L'Oreal on the negligence claim, noting a treating physician could provide admissible opinion testimony or medical records as to what caused the condition. The court noted: "[I]t isn't clear that [an] expert -- independent, retained expert is necessarily required on -- on that negligence issue . . . just because there's no causation element[.]" The court also expressed uncertainty as to whether disclosure of every treating physician was necessary. L'Oreal informed the court no depositions had been taken of any treating physicians except Unde's ophthalmologist. In deposition, the ophthalmologist testified the deterioration in Unde's eyes was caused by or related to Unde's diabetes.

The court asked Unde to respond to L'Oreal's arguments regarding the necessity for expert testimony. Unde responded

that a witness would testify that he saw Unde use the cream so "there is no necessity of expert witness." The court disagreed, stating: "Yes, there is unfortunately. [¶] Just because you used a product and you have an adverse reaction . . . it's not proof that it's dangerous or defective as designed or manufactured. And it requires expert testimony as I understand the law."

The court noted Unde stated in his opening statement that he would prove L'Oreal performed inadequate development, research, and testing of the face cream. If Unde proved corporate negligence, the court reasoned, he would not need expert testimony to prove his negligence claim.

The court tentatively granted the motion for nonsuit as to product liability but denied it as to the negligence claim. The court permitted Unde to provide further briefing on the issue. The court noted: "There has to be some sort of causal link by expert testimony in order to satisfy the legal standards."

Trial continued. The court adopted its tentative decision granting the motion for nonsuit as to liability but reserved ruling as to negligence.

At trial, Unde presented testimony by Wilbert Eplett and Christopher O'Halloran. Eplett, who had been acquainted with Unde for about 10 years, was at Unde's residence on September 19, 1999. Unde told Eplett he had two spots over his eyebrow and showed Eplett a jar of L'Oreal face cream. About a week later, Eplett saw Unde again. Unde's forehead and the area

around his eyes had noticeably darkened. Unde told Eplett he was having trouble and was going to go to a skin clinic.

Eplett conceded he had no knowledge of the make-up of face creams. Nor did Eplett possess any training in dermatology.

O'Halloran, who met Unde in early 2000, testified he knew of Unde's vision problems. O'Halloran also conceded he lacked any qualifications in dermatology or ophthalmology.

At trial, Unde moved only three exhibits into evidence. Exhibit G consists of the store receipt for the L'Oreal face cream. Exhibit H is a plastic tube of sunscreen. Exhibit I is a chart regarding laser surgery used by another witness.

Following further trial testimony by Unde, L'Oreal renewed its motion for a nonsuit on the negligence claims. L'Oreal noted Unde had called all the witnesses he intended to call and yet had presented no evidence regarding the standard of care or causation.

The trial court stated: "Well, I think, sir, based on what you've said that I have heard quite enough at this point -- that there is no evidence of standard of care. There is no evidence of causation. There is no evidence of any relationship between the use of the product or any injury that you've sustained." The court continued: "I have allowed the jury to sit through endless hours of testimony, none of which has established the basic elements of a claim against L'Oreal other than you bought the product and at some point in time after you had a problem which no one has connected to that product. [¶] So unless you have anything else to add at this point the court is going to

dismiss your case.” The court then granted the nonsuit motion in its entirety.

Following an order of dismissal, Unde filed a motion for a new trial. The court denied the motion, finding the chemical nature of the product beyond the knowledge of a layperson and thus requiring expert testimony to establish defect and causation. The court reviewed the testimony Unde presented at trial. Unde filed a timely notice of appeal.

DISCUSSION

I

A defendant in a civil action is entitled to nonsuit if the trial court concludes that the plaintiff's evidence is insufficient as a matter of law to permit a jury to find in his or her favor. The trial court may not weigh the evidence or consider the credibility of witnesses. Instead, it must accept the evidence most favorable to the plaintiff as true and disregard conflicting evidence. The plaintiff's evidence must be given all the value to which it is legally entitled, including every legitimate inference that may be drawn in the plaintiff's favor. However, a mere scintilla of evidence is not enough. Substantial evidence creating a conflict for the jury to resolve must exist. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1065 (*Burlesci*).)

In reviewing the grant of nonsuit, we follow the same rules requiring the evidence to be evaluated in the light most favorable to the plaintiff and least favorable to the defendant. All presumptions, inferences, and doubts are resolved against

the defendant. We may not affirm unless judgment for the defendant is required as a matter of law. (*Burlesci, supra*, 68 Cal.App.4th at p. 1065.) In a negligence case, if a plaintiff produces no substantial evidence of liability or proximate cause, then granting of a nonsuit is proper. (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1209.)

II

Unde argues the trial court erred in failing to specify its grounds for granting L'Oreal's nonsuit motion. However, Unde cites no authority and we are aware of no basis for a requirement that the trial court provide an explanation for its ruling.

Code of Civil Procedure section 581c provides the grounds for the motion for nonsuit.² Section 581c sets forth no requirement that the court prepare a statement of grounds for granting the motion. Instead, subdivision (c) of that section states: "If the motion is granted, unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits."

Nor do we find Unde's reliance on *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689 (*Miller*) persuasive. In *Miller*, the Supreme Court found the trial court erred in not providing reasons for its ruling on a motion for a

² All further statutory references are to the Code of Civil Procedure.

new trial under section 657. *Miller* does not address a court's granting of a nonsuit under section 581c.

Moreover, even though not required to do so, the trial court in the present case provided ample explanation for its ruling. The court informed Unde during early argument on the motion, "Just because you used a product and you have an adverse reaction . . . it's not proof that it's dangerous or defective as designed or manufactured. And it requires expert testimony as I understand the law. [¶] And I'm going to reread this case. [¶] I think counsel is correct. You can't simply have the jury substitute [its] judgment on technical matters of that nature without an expert witness"

After reviewing case law, the court clarified its rationale: "I do think based on . . . those cases that the motion for non-suit as to the products liability claims does require a[n] affirmative expert testimony be presented by the plaintiff -- qualified experts in the field. [¶] The plaintiff failed to disclose any experts at all . . . and has not listed any experts on product liability matters as witnesses in this matter." The court reminded Unde that "[t]here has to be some sort of causal link by expert testimony in order to satisfy the legal standards."

Finally, prior to granting the motion, the court informed Unde: "Well, I think, sir, based on what you've said that I have heard quite enough at this point -- that there is no evidence of standard of care. There is no evidence of

causation. There is no evidence of any relationship between the use of the product or any injury that you've sustained."

As the ruling evolved, the trial court made clear its concerns and thoughts regarding the necessity of expert testimony. The court stated its reasons on the record for granting L'Oreal's nonsuit motion.

III

Unde argues he introduced sufficient evidence to support his claims of product liability and negligence. According to Unde, he established a prima facie case that L'Oreal's face cream caused his injuries, thus shifting the burden to L'Oreal to establish that the product did not cause his injuries.

Unde claims L'Oreal conceded its product caused his injuries. The record belies his claim.

Unde finds a concession from the language of the face cream label, which, he asserts, implies causation. He argues, "With causation implied in the instructions on label, eloquently, instructions [s]tate, if the product is applied more than 3 times a week, PM only, it will cause adverse effects or injury [citations]. This accepts a *medical probability to ALL SKIN TYPES*." Unde also cites the label's statement that "[d]elicate skin may experience a slight tingling sensation. If this continues, allow 15 minutes after cleansing before applying or use sparingly until skin adapts."³ However, neither the

³ The label states: "WHEN TO USE: PM only -- recommended 3 times a week."

instructions recommending application three times a week nor the comment about delicate skin amount to a concession that the skin cream causes injuries. The record before us contains no evidence that L'Oreal actually conceded its face cream injured Unde.

IV

In his second amended complaint, Unde alleged L'Oreal's face cream caused his injuries when "used in the manner intended by the defendants." Unde also alleged breach of express warranty. In effect, Unde alleges L'Oreal's face cream was defectively designed, failing to satisfy ordinary consumer expectations as to safety in its intended use. Such defective design, if proven, gives rise to strict liability on the part of the manufacturer. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429-430 (*Barker*).) Unde argues a products liability cause of action does not automatically require expert testimony to establish liability on the part of the manufacturer.

In *Barker*, the Supreme Court posited two separate tests to establish product liability: "[A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alternatively be found defective in design if the

plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design." (*Barker, supra*, 20 Cal.3d at p. 432.)

As to the first test, the Supreme Court observed that the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defects, because often a consumer does not know what to expect from a given product or how safe a product can be made. (*Barker, supra*, 20 Cal.3d at p. 430.) Therefore, a product may be found defective even if it satisfies ordinary consumer expectations, if through hindsight the jury determines the risk of danger inherent in the challenged design outweighs the benefits of such design.

(*Ibid.*) In evaluating the adequacy of a product's design, the jury may consider many factors, including: "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (*Id.* at p. 431.)

The Supreme Court further refined the consumer expectation test in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 (*Soule*). In *Soule*, the court held "the consumer expectations test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus

defective regardless of expert opinion about the merits of the design. It follows that where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect." (*Id.* at p. 567.)

However, the consumer expectations test does not apply when the degree of safety a product should exhibit under particular circumstances is a matter beyond the common experience and understanding of its ordinary users. "The crucial question in each individual case is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (*Soule, supra*, 8 Cal.4th at pp. 568-569.) When the ordinary consumer expectations test does not apply, the trier of fact instead employs the balancing of risks and benefits required by the second test enunciated in *Barker*.

In *Soule*, the Supreme Court reviewed numerous cases in which the consumer expectations test was found either appropriate or inappropriate. A defectively designed public bus with no "grab bar" survived a nonsuit motion based on a lack of expert testimony. The court in *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112 found public transportation a matter of common experience that did not require expert testimony. However, the mechanical design of an emergency shut-off switch on a cotton picking machine did not warrant the consumer

expectations test in *Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40.

In two medical cases, courts reached different conclusions as to the applicability of the consumer expectations test. A court upheld the consumer expectations test in evaluating a plaintiff's claim of toxic shock syndrome in *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831. The court found that, in a time before general awareness and warnings about toxic shock syndrome, a consumer had every right to expect a seemingly innocuous product would not lead to a potentially fatal illness. (*Id.* at p. 867.) In contrast, in *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, a plaintiff, relying on the consumer expectations test, presented only her own testimony regarding the durability of her breast implants. The appellate court found breast implant performance beyond common consumer experience and found expert testimony regarding consumer expectations relevant and admissible. (*Id.* at pp. 732-733.)

In the present case, L'Oreal argues the court properly determined that the consumer expectations test did not apply to Unde's claim of product defect. We agree.

As L'Oreal observed in moving for a nonsuit, Unde failed to provide expert testimony regarding the cream's ingredients or any effects of the cream. The trial court found Unde's claim of an adverse reaction in the absence of any expert testimony insufficient, noting: "You can't simply have the jury

substitute [its] judgment on technical matters of that nature without an expert witness"

The trial court did not err in granting the nonsuit based on the dearth of expert testimony. As L'Oreal points out, courts have found the alleged creation or exacerbation of allergies by a product beyond the purview of the consumer expectations test. (See *Morson v. Superior Court* (2001) 90 Cal.App.4th 775, 795.) Given the complex nature of Unde's claims against L'Oreal, the trial court appropriately found the lack of expert testimony doomed his effort to invoke the consumer expectations test.

IV

In order to proceed under the second test enunciated in *Barker*, Unde must show L'Oreal's face cream caused his injury, at which point the burden shifts to L'Oreal to prove that, on balance, the benefits of the product outweigh the risks. However, Unde cannot prove causation in the absence of expert testimony concerning the effects of the facial cream.

The record before us contains only lay witness testimony that Unde used the face cream and that, at a later date, his skin appeared to darken. However, the mere possibility that a defendant's conduct might have caused a plaintiff's injury is not sufficient to establish causation. (*Spencer v. Beatty Safway Scaffold Co.* (1956) 141 Cal.App.2d 875, 882.) A plaintiff must produce evidence that supports a logical inference in the plaintiff's favor and that does more than

merely permit speculation or conjecture. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403.)

Here, Unde failed to provide any competent expert evidence that L'Oreal's facial cream caused his injuries. After reviewing the rather fragmentary record in the light most favorable to Unde and resolving all doubts and inferences against L'Oreal, we find as a matter of law that Unde cannot establish L'Oreal's facial cream caused his injuries. Therefore, the trial court appropriately granted L'Oreal's nonsuit motion.

V

Unde makes several other brief arguments, none of which we find persuasive. Unde contends the record reveals the trial court exhibited a "prejudicial bearing" throughout the proceedings. Our review of the record reflects the trial court treated Unde courteously and fairly.

Unde states: "Biased Juror Permitted to Seat in Jury Panel." However, Unde fails to develop this argument or provide any citations to the record to support his claim. Accordingly, the argument is waived.

Unde also accuses L'Oreal of being an "aggressive profiteer with no conscious [*sic*] for duty and morals." Again, Unde fails to offer any citation to the record or legal authority to support his assertions.

Finally, Unde argues a nonsuit is against the spirit of product liability law. However, the law does not exempt products liability cases from a motion for a nonsuit.

DISPOSITION

The judgment is affirmed. L'Oreal shall recover costs on appeal.

RAYE, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.